In the High Court of Judicature at Madras

Dated: 18.01.2006

Coram:

The Honourable Mr.Justice S.R.SINGHARAVELU

Civil Revision Petition (NPD) No. 761 of 2004
and
C.M.P.No.6159 of 2004

1. Radha Gopalakrishnan
2. Sudha Vijayakumar .. Petitioners

..vs..

1. M.Rajendran
2. Latha
3. Geetha Madhumohan .. Respondents

Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order dated 22.12.2003 passed in I.A No.305 of 2003 in O.S.No.274 of 1997 on the file of the District Munsif Court, Poonamallee.

For Petitioners : Mr.R.Thiagarajan
For Respondents : Mr.T.V.Ramanujam, Senior Counsel
for
Mr.T.V.Krishnamachari for R1 & R2
No appearance for R3

ORDER

This Civil Revision Petition arises against the order dated 22.12.2003 by the District Munsif, Poonamallee in I.A.No.305 of 2003 in O.S.274 of 1997, which was an application preferred by the revision petitioners/ plaintiffs 1 and 3 on 12.02.2003 under Order 23 Rule 1 CPC, seeking permission to withdraw the suit filed by them with liberty to file a fresh one on the same cause of action.

2. That was a suit filed by these petitioners and others Radha, Geetha and Sudha, who are among the five foster daughters of late M.G.Ramachandran, who expired on 24.12.1987 when his Will dated 18.01.1987 came into operation, wherein the executor was Mr.N.C.Raghavachari and alternatively under such circumstances the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

present first defendant Rajendran. The said Will was probated in O.P.No.388 of 1992 and according to the same, there was life estate given to Mrs.Janaki, widow of the deceased and after whose death that took place on 10.05.1996 the three plaintiffs along with two other foster daughters Janaki Sivaraman and Nirmala Ravindran were to enjoy till their life and after whose lifetime, the interest may devolve upon their children.

3. The subject matter of the Will was an extent of acre 6.46 comprising of three items measuring acre 2.18 in Survey No.19, acre 1.38 in Survey No.20 and acre 2.90 in Survey No.21 of Manappakkam Village, Ambattur Takluk. Survey No.19 and 20, according to the plaintiff, contained the bungalow portion and the remaining extent in Survey No.21 was vacant. The building area was bequeathed to the foster daughters and the vacant land was given to a proposed School for Deaf and Dumb. The present executor of all is first respondent / first defendant. There is some dispute inter se as to the capacity of first defendant to become executor, while the first executor Mr.N.C.Raghavachari was alive, and which issue is not very much relevant here. There happens to be some difference of opinion between the plaintiffs and Nirmala, another foster daughter of the testator.

4. Plaintiffs' allegation in this suit is that they are entitled to the entire area of Survey No.19 and 20, which is disputed by the defendants. Plaintiffs' further allegation is that defendants attempted to encroach upon the above said area through a gate 'A J' found in the plan connected to the plaint.

5. The respondents /defendants' contention was that the portion 'ABCDEFGHIJ' was given to the plaintiffs as per the Will and that lies only in Survey No.19/2 and 20/2 comprising in patta No.31; whereas outside the above area 'ABCDEFGHIJ' it was given to the Home for Deaf and Dumb and that is lying in sub- division 1 and 3 of 19, 20/1 and 21 having patta No.37. According to the respondents, it is the plaintiffs, who want to interfere and engulf the area given to Deaf and Dumb, in proof of which, it was stated on the side of the respondents/ defendants, several litigations were frivolously filed by the plaintiffs and in their written statement, they also enumerated the said litigations of plaintiffs, which are reproduced hereunder as also found in counter affidavit of this petition.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

SlNo	Case No.	Prayer	Result
1	O.S.No.274/97 I.A.No.1287 and 1290 of 1997	1. to stop the deaf and dumb from using the main entrance. 2. To grab 64 grounds of land worth 10 crores bequeathed to the Deaf and Dumb.	Both the IA's have been dismissed with costs and the main suit is pending. CMAs dismissed by Fast Track Court-III, Poonamallee vide Order dt.28.06.2002
2	W.P.No.321 of 1999	To revise the patta granted in favour of the MGR Oomaigal Illam during the life time of Smt.Janaki Ramachandran	R.D.O. Sriperumbuthur was directed to give a hearing
3	W.P.No.17167 of 1998	To direct the Principal of MGR School to re-admit Venkatachalam, a student	Student and his father wrote to Vijayakumar's lawyer not to persue the case. Writ petition dis-missed as not pressed.
4	W.P.No.17999 of 1998	Interim prayers to close the college and not to renew affiliation and to demolish buildings.	Not granted
5	W.P.No.18118 of 1999	To prohibit the construction of bridge.	Dismissed
6	W.A.No.259 of 2000	Appeal against the above order	Dismissed
7	Application No.2167 of 1999	To appoint new trustee for MGR Trust	Dismissed
8	OSA 130 of 2000	Appeal against the above order	Notice issued
9	Application No.4468 and 4469 of 2000 in O.P.388 of 1992	To remove the Executor	Ordered that applications be returned to the Applicants and shall present the same in the form of ori-ginal petition
10	C.S.No.528 of 1999 (Harikrishna)	To grant 6 grounds of land bequeathed to the Deaf and Dumb valued at 1.2 crores of rupees	Ordered that plaint be returned for representation in proper Court.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

SlNo	Case No.	Prayer	Result
11	OSA No.123 of 2000	Appeal	Dismissed
12	W.P.16810 of 2000	To demolish constructions of College buildings in Sathya Studios Campus	Not granted. CMDA regularied the constructions
13	W.P.17482 of 2000	To demolish constructions in Sathya Gardens	Not granted. CMDA regu-larised the construction.

6. It is in these circumstances, the petitioners wanted to withdraw the suit with liberty to file a fresh suit on the same cause of action. The only reason therefor given in the affidavit of the petitioners / plaintiffs is as follows:

> "I further submit that the plaintiffs and the defendants are relatives. As a gesture to pave way for the 1st defendant to allot the property as per the Will I am withdrawing the suit. If necessary I may have to file a comprehensive suit. Hence, liberty to file fresh suit".

In view of the pendency of large number of litigations inter se, this above mentioned gesture for withdrawal of suit appears not a substantial or bona fide one. According to the respondents, it is a make belief affair. However, I find it only hallow.

7. Mr.T.V.Ramanujam, learned senior counsel appearing for the respondents, first drew my attention to the non-maintainability of the revision at all. For which purpose, reliance was made on a case law in Shiv Shakti Coop.Housing Society, Nagpur ..vs.. Swaraj Developers and others ((2003 (6) SCC 659), wherein the distinction between appeal and revision was dealt with by observing that it is fairly a well settled position in law that the right of appeal is a substantive one; but there is no such substantive right in making an application under section 115 CPC, which is essentially a source of power for the High Court to supervise Subordinate Courts, and to have an effective control on the functioning of the subordinate courts, by such exercising of supervisory power. The right of appeal is only statutory in nature and thus it is a vested right. Also citing Attorney General ..vs.. Sillem (33 LJ Ex 209, it was observed that the appeal is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

8. In order to further distinction between the appeal and revision, reliance was placed on State of Kerala ..vs.. K.M.Charia Abdulla and Co., (AIR 1965 SC 1585), wherein it was held that "the distinction between right of appeal and revision is based on differences implicit in the two expressions. An appeal is continuation of proceedings; in effect the entire proceedings are before the Appellate Authority, and it has the power to review the evidence subject to statutory limitations prescribed. But in this case of revision, whatever powers the revisional authority may or may not have, it has no power to review the evidence, unless the statute expressly confers on it that power". Reliance was also placed on Hari Shankar ..vs.. Rao Giridhari Lal Chowdhury (AIR 1963 SC 698), wherein it was observed that "the distinction between an appeal and a revision is a real one. The appeal carries with it a right of rehearing on law as well as fact; the power of hearing revision is generally given to Superior Court so that it may satisfy itself that a particular case has been decided according to law".

9. In this connection, Section 115 C.P.C. after amendment stands as follows:

> "115. (1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears-
>
> (a) to have exercised a jurisdiction not vested in it by law, or
>
> (b) to have failed to exercise a jurisdiction so vested, or
>
> (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,
> the High Court may make such order in the case as it thinks fit:
>
> Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceedings, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.
>
> (2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(3) A revision shall not operate as a stay of suit or other proceeding before the court except where such suit or other proceeding is stayed by the High Court.

Explanation:- In this section, the expression 'any case which has been decided' includes any order made, or any order deciding an issue, in the course of a suit or other proceeding".

Before such amendment, there was deliberation of Committee, the view of which was referred in the above cited case (2003(6) SCC 659) in the following words.

"The Committee, however, feel, that, in addition to the restrictions contained in Section 115, an overall restriction on the scope of applications for revision against interlocutory orders should be imposed. Having regard to the recommendations made by the Law Commission in its 14th and 27th Reports, the Committee recommended that Section 115 of the Code should be retained subject to the modification that no revision application shall lie against an interlocutory order unless either of the following conditions is satisfied, namely:

(i) that if the orders were made in favour of the applicant, it would finally dispose of the suit or other proceeding; or

(ii) that the order, if allowed to stand, is likely to occasion a failure of justice or cause an irreparable injury".

10. The learned counsel Mr.R.Thiagarajan appearing for the petitioners would contend that apart from the distinctions between appeal and revision, this civil revision petition is maintainable, inasmuch as there was some irregularity manifestly committed by the court below, which is also to be considered and discussed.

11. The impugned order was made in exercise of Order 23 Rule 3 CPC which is as follows:

Withdrawal and Adjustment of Suits:
(1) .....
(2) .....
(3) Where the Court is satisfied:-

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim".

What the lower court ordered was withdrawal of suit as claimed by the petitioners/plaintiffs on the basis of no objection by the respondents/defendants and also on the ground that the court cannot compel the petitioners/ plaintiffs to conduct the suit when they want to withdraw the same. Thus, there is no dispute in connection with withdrawal of suit. The really aggrieved portion of the order, is that the court refused to grant leave to plaintiffs to file a fresh suit on the same cause of action. Excepting the mentioning of the order passed by this Court in WP 14272 of 2000 that without taking into consideration of the proceedings for cancellation of patta, the suit can be disposed of on merits, which has nothing to do with the subject matter of granting leave to file fresh suit on the same cause of action; there is no additional reason adduced in the impugned order. It is in this context, the learned counsel for the petitioners/ plaintiffs made stress on the maintainability of this revision. Bearing this in mind discussion on merits can be done.

12. Now, coming to the question as to whether leave ought to have been granted or not, one has to follow the principles of law enunciated in this regard in K.S.Bhoopathy ..vs.. Kokila (AIR 2000 SC 2132). That was a case, where "the plaintiffs filed a suit and sought relief, inter alia, of injunction against defendants restraining them from establishing and running a flour mill on their property and for further injunction restraining them from disturbing the plaintiffs' exclusive user of the pathway, lying between the properties of the plaintiffs on one side and defendants on the other. Defendants in the suit as owners sold portions of their land by separate sale deeds executed in favour of plaintiffs. It was the case of plaintiffs that establishment of the proposed flour mill by the defendants will act as a nuisance and will seriously prejudice the plaintiffs' user of their property on which they have constructed a clinic. Regarding the pathway the case of the plaintiffs is that they have exclusive right of user of the same and the plaintiffs should not be permitted to interfere with their right in any manner. The trial court decreed the suit holding inter alia that the plaintiffs' have an exclusive right of user over the pathway. The trial Court also accepted the case of

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

the plaintiffs in respect of the prayer for injunction contesting defendants from establishing a flour mill on their property. On appeal first appellate Court modified the decree relating to the pathway holding that the plaintiffs have no exclusive right of user of the pathway and all the parties entitled to use the same as it is a common pathway. The plaintiffs filed the second appeal, and before said appeal was admitted the plaintiffs filed an application under O.23, R.1(3), C.P.C.seeking permission of the Court to withdraw the suit with leave to file a fresh suit as no prayer for declaration of plaintiffs title over the pathway was made in the plaint and in view of the cloud raised against their exclusive title and right of user in the judgment of the lower appellate Court it was necessary to withdraw the suit and file a fresh suit property constituted and seeking appropriate relief. The application filed by the plaintiffs was allowed by the High Court.

13. In such a situation, it was held that the approach in the order impugned was that

> "since interest of the defendants can be safeguarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach would be clearly erroneous. It is the duty of the Court to feel satisfied that there exist proper grounds reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that granting of permission will not prejudice the defendants".

14. While enunciating the law regarding that aspect, the following was observed.

> "The provision in Order XXIII, Rule 1, C.P.C.is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule (1)....But the grant of leave envisaged in sub-rule(3) of Rule 1 is at the discretion of the Court and such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided. (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and (2) the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the Court, that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action".

15. Thus, in order to entertain leave for fresh suit on same cause of action, there shall be two conditions;

(1) the suit sought to be withdrawn in its plaint must fail by some reason of formal defect;

(2) There should be sufficient grounds to the satisfaction of the Court for allowing the plaintiff to institute fresh suit on same cause of action.

16. So far as formal defect theory is concerned, the following decisions

(1) Baniram and others ..vs.. Gaind and others (AIR 1982 SC 789):(1981 (4) SC 209]

(2) Bakhtawar Singh ..vs.. Sada Kaur (AIR 1996 SC 3488) (referred in AIR 2000 SC 2132)

dealt with the matter to the effect that when there is formal defect in the plaint, the plaintiff would be granted leave to file fresh suit on same cause of action after permitting to withdraw the defective plaint. Among the said decisions, it is worthy to mention the following observations made in AIR 1996 SC 3488 (para 13).

"In the present case all the Courts below including the High Court concurrently found that the plaintiffs/appellants failed to produce any evidence to show that the permission to withdraw the suit was given on the ground that the suit was bound to fail by reason of some formal defect or there were sufficient grounds for allowing the plaintiffs to institute a fresh suit in respect of the same subject-matter. The plaintiffs had not even produced the application which is said to have been filed for withdrawal of the earlier suit with permission to file a fresh suit on the same cause of action, to show as to what was the formal defect in the earlier suit by reason of which it was sought to be withdrawn. In these facts and circumstances no case for fresh institution of suit on the same cause of action and for the same relief after the withdrawal of the earlier

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

suit was made out by the plaintiffs/appellants in accordance with the provisions of Clause (3) of Order 23, Rule 1 of the Code".

17. Regarding the theory of sufficient cause to grant leave for filing fresh suit on same cause of action, the case law in M/s.Hulas Rai Naij Nath ..vs.. Firm K.B.Bass and Co., (AIR 1968 SC 111) deals with the same. The question involved in this case was that whether the plaintiff was entitled to withdraw from the suit at the stage when issues had been framed, and some evidence had been recorded; but no preliminary decree for rendition of accounts had yet been passed. In that case, pleadings in the written statement clearly did not amount to a claim for set off. There could also be no counter claim since no provision was shown under which a counter claim could have been filed in the trial court in such a suit. There was also a circumstance that the application for withdrawal was moved at a stage when no preliminary decree had been passed for rendition of accounts and in fact the appellant was still contending that there could be no rendition of accounts in the suit because accounts had already been settled. Further, in the case of a suit between principal and agent, it is the principal alone who has normally the right to claim rendition of accounts from the agent. The agent cannot ordinarily claim a decree from the principal and in fact, in the suit the appellant/defendant who was the agent of the respondent/ plaintiff did not claim any rendition of accounts from the respondent/plaintiff. In these circumstances, at the stage of withdrawal of the suit, no vested right in favour of the appellant had come into existence and there was no ground of which the court could refuse to allow withdrawal of the suit. It is in such circumstance, plaintiff was allowed to withdraw the suit. In that case, reliance was also made on Seethai Achi ..vs.. Meyappa Chettiar (AIR 1934 Madras 337), wherein it was held as follows:

"Ordinarily, when the Court finds no impediment to the dismissal of a suit after the announcement of the withdrawal of the claim by the plaintiff, it will simply say that the suit is dismissed as the plaintiff has withdrawn from it. An order as to costs will also be passed. But several exceptions have been recognised to this general rule. In suits for partition, if a preliminary decree is passed declaring and defining the shares of the several parties, the suit will not be dismissed by reason of any subsequent withdrawal by the plaintiff, for the obvious reason that the rights declared in favour of the defendants under the preliminary decree would be rendered nugatory if the suit should simply be dismissed. So also in partnership suits and suits for accounts, where the defendants too may be entitled to some reliefs in their favour as a result of the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

settlement of accounts, the withdrawal of the suit by the plaintiff cannot end in the mere dismissal of the suit"

18. Thus, when no right could accrue to defendant before preliminary decree for rendition of accounts is passed, it is in such situation "sufficient cause" was found in favour of the plaintiffs to be granted with leave to file a fresh suit.

19. Yet another case, where such "sufficient cause" was found, is Executive Officer, Arthaneswarar Temple ..vs.. R.Sathyamoorthy (AIR 1999 SC 958), which has been referred to in AIR 2000 SC 2132. The observation found therein is as follows:

"Various High Courts have rightly held, while dealing with applications under Order 23, Rule 1, C.P.C.that if an appeal was preferred by an unsuccessful plaintiff against the judgment of the trial Court dismissing the suit and if the appellant-plaintiff wanted to withdraw not only the appeal but also the suit unconditionally, then such a permission so far as the withdrawal of the suit was concerned, can be granted if there was no question of any adjudication on merits in favour of the defendants by the trial being nullified by such withdrawal. On the other hand, if any such findings by the trial Court in favour of the defendant would get nullifiled, such permission for withdrawal of the suit should not be granted".

20. Among the two grounds of defective plaint and sufficient cause for leave to be granted for filing fresh suit on same cause of action, the first ground is not pleaded at all. So far as sufficient cause is concerned, it is found in the affidavit of the petition that it is only as a gesture to pave way for the first defendant to allot the property as per the Will, the withdrawal was sought for. In view of the fact that there was a deep dispute between the parties as to the area excepting the bunglow area mentioned as "ABCDEFGHIJ", to say that it is only to implement the Will the suit is withdrawn, is unbelievable. It is so because the dispute is in the very implementation of the Will. So, withdrawal is a farce. Of course on the principle that nobody can compel to proceed with the suit and there was also no objection for the other side, the withdrawal prayer was admitted. But when question of leave to file a fresh suit on same cause of action came in, there was no sufficient cause found and that therefore, it was rightly dismissed. When once the request to grant leave for filing fresh suit on same cause of action was denied, the order of withdrawal lies in the option of the plaintiff either to get exercised or not. This is one way of looking at things regarding "sufficient cause".

21. The other test for finding the availability of such cause was well laid as follows in para 32 of the judgment reported in 2003 (6) SCC 659.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

"A plain reading of Section 115 as it stands makes it clear that the stress is on the question whether the order in favour of the party applying for revision would have given finality to suit or other proceeding. If the answer is "yes" then the revision is maintainable. But on the contrary, if the answer is "no" then the revision is not maintainable. Therefore, if the impugned order is interim in nature or does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature, cannot be the subject-matter of revision under Section 115..."

22. By applying this test, if the order is interim in nature, then revision may not lie. Here is a case, where there was no compulsion to withdraw the suit by the plaintiffs. There was no dispute regarding the claim of withdrawal of suit by the plaintiffs. Therefore, they were permitted to withdraw. It is for them to withdraw or not. The decision is in their own hands. What was ordered was refusal to leave for filing suit on the same cause of action. I may justify that order by applying theory of sufficient cause and theory of formal defect in the plaint. There was no formal defect pointed out in the plaint. There was also no sufficient cause. What was mentioned in para 4 of the affidavit accompanying the petition under Order 23 Rule 1 CPC, is hallow and containing no sufficient cause.

23. It is further to be added that in and by virtue of the impugned order getting confirmation before me, the plaintiffs may only be compelled to proceed with the suit further as they were refused to be granted leave for fresh suit on the same cause of action. This indirect imperative or compulsive situation for plaintiffs is to proceed with the suit; which direction can only be termed as interim in nature inasmuch as it does not finally decide the lis nor
any finding in favour of anyone of the parties on merits is also given thereunder.

24. For the above reasons, this civil revision petition fails and is dismissed. No costs. Consequently, connected C.M.P.is closed

gl

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

To

1. The District Munsif,Poonamallee.

2. The Record Keeper,
   V.R. Section,
   High Court, Madras.

1 cc To Mr.T.V.Krishnamachari, Advocate, SR.1653.
2 cc To Mr.R.Thiagarajan, Advocate SR.1804.

PRE DELIVERY ORDER IN
C.R.P.(NPD)NO.761 OF 2004

AG(CO)
RVL 24.01.2006

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/